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No. 81-1891

IN THE

Supreme Court Of The United States

October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER

Respondents.

BRIEF OF AMICUS CURIAE THE METROPOLITAN WASHINGTON COUNCIL, AFL-CIO IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether employer contributions of a specific money amount per hour worked to union pension and/or welfare funds pursuant to a collective bargaining agreement are "wages" within the meaning of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act.

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Amicus Curiae the Metropolitan Washington Council, AFL-CIO respectfully submits the following views regarding *Morrison-Knudsen Construction Co. v. Director, OWCP, United States Department of Labor,* No. 81-1891.

INTEREST OF THE AMICUS

Metropolitan Washington Council, AFL-CIO is a labor organization representing over 151 unions in the Metropolitan District of Columbia area. These 151 unions have a combined membership of over 400,000 persons. Those members who work regularly in the District of Columbia are covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976), as made applicable to the District of Columbia by the District of Columbia Workers' Compensation Act, D.C. Code § 36-501 (1973).

Metropolitan Washington Council, AFL-CIO has received written consent form Petitioners Morrison-Knudsen Construction Company and Argonaut Insurance Company and Respondent Sonia Hilyer to file this brief as *amicus curiae.* Copies of these letters have been filed with the Clerk of the Court.

THE STATUTE INVOLVED

This case involves the proper construction of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(13), which provides as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

SUMMARY OF THE ARGUMENT

Despite petitioners' claims, the *Hilyer* decision's impact on employers, insurance companies, and the administration of compensation claims will not be unduly burdensome. Further, the small percentage increase in average weekly wage figures required by *Hilyer* in specific and limited circumstances will not be difficult to calculate or result in a windfall to employees.

More importantly, the *Hilyer* decision is clearly correct and raises no important or novel question of federal law. The broad language in the definition of "wages" and the remedial purpose of the Longshoremen's Act evidence Congress' intent that "wages" include all reasonably identifiable and calculable compensation bargained for by the employee. Moreover, if the employee's compensation did not include employer contributions to fringe benefit funds, the employee would receive this amount as additional direct pay. Either way the employer's hourly labor costs are the same. Accordingly, the mere fact that the employee chooses to receive part of his compensation indirectly must not result in the employee receiving lower disability payments. This conclusion is reinforced by the fact that the employee loses the fringe benefits coverage when he is not working. Consequently, the lower court properly held that "wages" include all value received as compensation by the employee that is reasonably identifiable and calculable. For these reasons, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE IMPACT OF THE LOWER COURT'S DECISION IS DE MINIMUS

Petitioners and the *amici* in support of the petitioners drastically overstate the effects of the decision below and the minimal administrative adjustments it may require. Their doomsday scenarios and extensive criticisms ignore the simple fact that the *Hilyer* decision merely requires, in limited and specific circumstances, the addition of certain readily calculable items to the broad category of employer compensation constituting "wages" under the Longshoremen's and Harbor Workers' Compensation Act. ("LHWCA" or "the Act"). 33 U.S.C. §901 *et seq.* (1976).

First, the *Hilyer* decision, by including certain employer contributions to pension, health and welfare, and training funds in the calculation of an employee's average weekly wage, affects only those employees who are in receipt of these fringe benefits. This by no means includes every employee covered under the Act. Rather, the decision affects only employees who, pursuant to a collective bargaining agreement or similar contract, have their employer pay fixed amounts to these funds in lieu of the employees receiving that money directly as pay. Consequently, the effects of the *Hilyer* decision are first contingent on particular employee compensation arrangements.

The scope of the decision below is further limited by the lower court's clear implication that only employer contributions measured in hourly amounts and tied to the employee's hourly work are to be included in the calculation of the employee's average weekly wage. Moreover, the employer contributions constituting "wages" are only

those precipitating specific tangible benefits bargained for by the employees. It is plainly ridiculous to state, as one *amicus* has, that given *Hilyer* the value of such benefits as the office coffee pot must also be included. The *Hilyer* court intended only tangible benefits bargained for by the employee in lieu of higher straight pay to be included as part of the employee's "wages".

The addition of these employer contributions to the definition of "wages" makes an employee's average weekly wage no more difficult to calculate. The prior concern of the Benefits Review Board (the "Board") and of the petitioners, that the value of these contributions cannot be accurately measured and that the Act's design as a mechanical and expeditious remedy is thereby destroyed, is totally groundless. Quite simply, as the lower court noted, the value of these contributions is measured by the amount of the employer's contribution to the various fringe benefit funds. *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981). It is not necessary, and certainly not logical, to attempt to ascertain some abstract measure of value to the employee of the employer provided benefits coverage. Rather, because the employee's economic advantage lies in the gain of such coverage *in lieu of higher straight pay,* with which the employee would have to purchase his own coverage, the employee's immediate economic gain is easily determined by looking to the amount of the employer's hourly rate of contribution to the various funds. Thus, the additional calculations require no more than looking to the employer's books or the union contract to determine this rate. This determination is clearly less speculative than calculating the value to the employee of the use of a car, which has been held to constitute "wages" under a similar state workers' compensation statute. *Leslie v. Reynolds,* 179 Kan. 422, 295 P.2d 1076 (1956).

Similarly, the lower court properly allayed the Board's fear that by including these contributions in the definition of "wages", the calculation of average weekly wage pursuant to Section 10(b) would require the finding of a fellow employee who had a similar status vis a vis the union funds. As the court of appeals noted, because the contributions are made on a per-hour basis for each employee, the contributions are included in the average weekly wage "simply by determining the amount of contributions made on behalf of the fellow employee who, having worked similar hours, serves as the referent in any event." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 213. In short, the employer contributions are made without regard to the employee's status in relation to the funds. Accordingly, the fear that the lower court's decision complicates the Section 10(b) determination is also groundless.

More importantly, it is simply not true that in light of the *Hilyer* decision employees will receive more compensation while out of work than they received while working. This fear misapprehends the value of fringe benefits to the employees and the terms under which the employer makes contributions to the benefit funds. The assertion implies that, for example, the health insurance coverage is worth nothing unless and until benefits are paid. This is clearly erroneous. The value to the employee of the insurance coverage is in its *protection;* namely, in the fact that the employee does not have to purchase private insurance coverage. Accordingly, while under the *Hilyer* decision the employee may receive a higher dollar amount of disability payments, this amount will not accurately reflect what the employee is receiving in light of what he has lost. This is because, pursuant to virtually every contract providing for employer contributions to fringe benefit funds, the

benefits are lost when the employee is not working. Thus, by being out of work, the employee suffers the loss of critical insurance coverage and must buy his own private insurance protection. Further, private insurance rates are generally higher than the group rates available to employers. Consequently, any nominal gain to the employee in higher disability payments is outweighed by the cost of purchasing similar private insurance. Therefore, fears that *Hilyer* will be incentive for employees to remain off work are groundless.

In this light, it is clear that the court included as "wages" what the employer *actually pays* on a hourly basis, when reasonably identifiable and calculable, as opposed to what the employee may nominally receive. This is because the latter is deceiving as an accurate measure of the employer's compensation for the employee's services. The key point is that the employee loses the fringe benefits if he is not working. If the employer contributed to the benefit funds on behalf of the employee whether or not the employee was working, the amount of the contributions would not be included as "wages". In such a case the employee's "wages" would still be tied to what the employer actually pays the employee on an hourly basis, and the employee would not have to use his disability payments to purchase private insurance.

It is thus clear that the *Hilyer* decision will not result in a windfall for employees at the expense of employers and insurance companies. In fact, *Hilyer* takes away from employers an unjustified benefit they have long been receiving at the expense of their employees. Prior to *Hilyer* if an employer's total hourly labor cost per employee was nine dollars in pay and one dollar in contributions to various benefit funds, when the employee was disabled, the disability payments were based on only

nine dollars. Furthermore, as noted above, the employee lost his insurance coverage and had to purchase private coverage out of the disability payments. The *Hilyer* decision merely requires that the disability payments be based on the employer's total labor cost of ten dollars, which figure more accurately represents the employee's true hourly "wages".

Finally, the inclusion of employer contributions to various benefit funds is directly analogous to the inclusion of vacation and overtime pay, which have long been held to be included as "wages". *Baldwin v. General Dynamics Corp.*, 6 BRBS 396, BRB Nos. 76-271/A (August 4, 1977); *Ward v. General Dynamics Corp.*, 9 BRBS 569, BRB No. 78-394 (December 29, 1978).

In sum, the *Hilyer* decision's impact on employers, insurance companies, and the administration of compensation claims will not be unduly burdensome. Despite petitioners' fears, the small percentage increase in average weekly wage figures required in the limited and specific circumstances noted above, will neither be difficult to calculate nor a windfall to employees. Further, neither the insurance industry nor the Office of Workers' Compensation Progams will collapse under the weight of this small adjustment. Simply, the lower court carefully concluded that in those situations where an employer contributes on an hourly basis amounts to various benefit funds, as bargained for by the employees, such amounts shall be included in the calculation of average weekly wage. This is not the stuff from which doomsday scenarios are convincingly made.

II. THE DECISION BELOW WAS CLEARLY CORRECT

Given the Act's broad definition of "wages" and its remedial purpose the lower court properly held that certain employer contributions to benefit funds constitute "wages". This conclusion is reinforced by the plain language of Section 2(13) and by cases interpreting "wages" under the LHWCA and similar state workers' compensation acts.

Most importantly, it must be recognized that if the employee did not contribute the hourly sums to the various funds, the employee would receive that additional amount in his paycheck. In such a case, it is indisputable that the whole amount would constitute "wages". It is only because the employee's collective bargaining representative negotiated the employee compensation in terms of both direct pay and indirect contributions to benefit funds, that the employee does not presently realize the whole amount in his paycheck. As noted in Part I, *supra,* however, either way the employer's hourly labor costs are the same. Accordingly, the employee's disability benefits should not be reduced merely because the employee chooses not to receive all the bargained for compensation directly.

Moreover, the lower court properly recognized that if the money contributed to the funds went directly to the employee, and then the employee contributed it to the funds, that amount would be included as part of the employee's "wages". As the lower court further recognized, this result cannot change "simply because the company has agreed to eliminate two unnecessary steps by paying the contributions directly to the trust funds." *Hilyer v. Morrison-Knudsen Construction Co.,* 670 F.2d at 212. This is surely correct. The Supreme Court reached this same conclusion in holding that employer contributions to

similar union health and welfare funds were "sums justly due" to employees under the Miller Act, 40 U.S.C. § 270a *et seq. United States v. Carter,* 353 U.S. 210 (1957). In so holding, the Supreme Court noted that:

> The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been "paid in full" for their labor in accordance with the collective bargaining agreements.

Id. at 218. The same holds true here. Therefore, for the purpose of Section 2(13), the lower court correctly characterized the employer contributions as equivalents to direct compensation payments to the employee.

The lower court's holding is further compelled by the fact that the employer's contributions relieve the employee of the burden of purchasing similar health and retirement coverage. Part I, *supra.* This point was emphasized by the United States Court of Appeal for the District of Columbia in its earlier holding that the value of food regularly furnished restaurant employees constituted part of "wages" under the LHWCA. *Harris v. Lambros,* 56 F.2d 488 (D.C. Cir. 1932). The Court stated:

> [H]ere we have a case in which employees, by reason of the nature of their employment are relieved of the burden of providing food for themselves. . . . [T]he whole purpose of the Act is to provide indemnity to an injured employee based upon the wage loss sustained by him as a result of the injury, and to an employee of this defendant the loss in such case would not be his wages alone, but his wages and his food, since

> each was a benefit which he enjoyed while employed and is deprived of when injured.

Id. at 489. Accordingly, if the employer's contributions to the various funds are not included as part of "wages", the employee must deplete the disability payments in order to secure the benefits previously provided by the employer. In such a case, the employee's disability payments do not accurately reflect the employee's true loss. *See, Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888, BRB Nos. 76-314/A (January 31, 1979) (Miller dissenting).

It is also significant that generally, when wage increases are negotiated by the employee's collective bargaining representative, it is left to the representative to determine what portions of the hourly increase shall be allocated to pay and what portions to various fringe benefits. *Id.* This further supports the point that these fringe benefit contributions must be included as "wages" to accurately reflect the employee's bargained for compensation.

In reaching its decision, and with particular regard to pension fund contributions, the lower court cited *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W. 2d 136 (1971). In *Hite,* the court addressed the identical issue presented here. The court held, *inter alia,* that employer contributions to a pension fund and a group insurance plan were to be included in determining average weekly wage. The court stated that even though an employee was not eligible for a pension until after ten years of employment, the fact that prior to that time the employer was putting aside specific sums for this potential benefit required the inclusion of that hourly amount in the computation of the employee's weekly wage. This followed in that as a result of the injury, the injured employee had to find some other way of providing income for retirement. The same reasoning followed for the employer's contribu-

tions to the group insurance plan. Directly on point, the *Hite* decision was properly persuasive for the lower court.

Cases interpreting the plain language of Section 2(13), and nearly identical language in state workers' compensation statutes, reinforce the basic fact that the definition of "wages" was intended to be flexible and include all economic gain which is "reasonably identifiable and calculable." It cannot be argued that because employer contributions to benefit funds is not listed in Section 2(13) they were intended to be excluded. The Benefits Review Board has already expanded Section 2(13) in holding that vacation pay and overtime pay constitute "wages". *Baldwin v. General Dynamics Corp., supra; Ward v. General Dynamics Corp., supra.* Additionally, the Board has held that automobile parts, received as recompense for services rendered, were an "advantage" received falling within the definition of "wages". *Carter v. General Elevator Co.,* 14 BRBS 90, No. 78-597 (August 3, 1981). Clearly the Board has always maintained that the definition of "wages" was intended to be very broad.

State court opinions are consistent with this broad interpretation of "wages". In *Richmond v. Weiss & Goldring, Inc.,* 124 So. 2d 601 (La. App. 1960), the court stated that in computing the wage basis under the state's workers' compensation act, there should be included not only wages and salary, but anything of value received as consideration for the work. As authority, the court cited 2 *Larson, Workmen's Compensation Law* § 60.12 (1952) Similarly, an Arizona court stated that included "in the computation of average monthly wage is anything constituting real economic gain to the claimant." *Harvey Auto Supply v. Industrial Commission,* 25 Ariz. App. 274, 542 P.2d 1154 (1976). This court also cited Larson's treatise as authority. In this light, the lower court's characterization

of "wages" as value received by the employee which is "reasonably identifiable and calculable" is clearly correct.

Petitioners attempt to make much of their own interpretation of the LHWCA's legislative history, stating that Congress never intended fringe benefits to be included under Section 2(13). For several reasons, this view is erroneous. First, the plain language of Section 2(13) states that "wages" include "similar advantage received from the employer." This clearly evidences Congress' intent that the definition of "wages" be flexible. The Board has reaffirmed this intent by including overtime and vacation pay within Section 2(13), despite their omission by Congress. Secondly, when the Act was first enacted, few, if any, fringe benefits were provided by employers. Now, however, they are relatively common. Thus, these benefits are just the type of "similar advantage" intended by Congress to be encompassed in the flexible definition of "wages". In sum, there is no evidence that Congress did not intend the term "wages" to be flexible over time, given the broadness of the definition. Rather, Congress intended to compensate injured employees by including within the calculation of average weekly wage all compensation of identifiable value.

This view is strongly supported by the general principle that the Act must be liberally construed in conformance with its humanitarian and compensatory purpose. *Voris v. Eikel,* 346 U.S. 328 (1953); *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977). Thus, in interpreting and applying the provisions of the Act, the statutory terms should be given broad application in order to accomplish the remedial aims of the statute. *Michigan Mutual Liability Co. v. Arrien,* 233 F.Supp. 496 (S.D.N.Y. 1964), *aff'd,* 344 F.2d 640 (2nd Cir.), *cert. denied,* 382 U.S. 835 (1965).

As several state courts noted, this principle should be equally applicable to the computation of an employee's wage base. *See, e.g., Dixon v. Postlewait Glass Co.*, 241 Mo. App. 174, 238 S.W. 2d 93 (1951). Accordingly, the inclusion in Section 2(13) of employer contributions to fringe benefit funds is consistent with both Congress' flexible definition of "wages" and the judicial mandates that the Act be liberally construed to effect its remedial purpose.

Finally, it is important to note that the Benefits Review Board has chosen to follow the *Hilyer* decision in subsequent cases raising this same issue. *Minick v. Levin Metals Corp.*, _____BRBS_____, BRB No. 80-835 (April 28, 1982). This is significant because the Board does not always accept the court of appeals' interpretations of the Act. For example, the Board explicitly declined to follow the interpretation of Section 20(a) of the Act, 33 U.S.C. § 920(a), promulgated by the lower court in *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom., U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, United States Department of Labor*, 452 U.S. 913 (1982). *Jones v. J.F. Shea Co.*, 14 BRBS 207, BRB No. 79-548 (June 16, 1981). Thus, the Board's reversal of its longstanding position in favor of the *Hilyer* decision evidences the Board's affirmance of the soundness of the lower court's decision.

CONCLUSION

In view of the *Hilyer* decision's minimal effects on the administration of compensation claims and its proper interpretation of the LHWCA's definition of "wages", and the fact that the decision raises no important or novel question of federal law, the Metropolitan Washington Council, AFL-CIO respectfully urges this court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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